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Air Force Told To Free Officer In 'Secrets' Case

Appeals Court Upholds a Claim of Immunity

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WASHINGTON, Feb. 22— The United States Court of Military Appeals today dismissed court-martial charges against Lieut. Christopher M. Cooke, the missile-launch crew member who was accused of passing information to the Soviet Embassy, and the Air Force discharged him.

In a 2 to 1 decision, the court ruled that Lieutenant Cooke, deputy commander of a Titan 2 crew in Kansas, could not be tried. The civilian judges noted that the Air Force had granted him immunity from prosecution in exchange for his cooperation.

The lieutenant, who is 26 years old, was given an "other than honorable discharge" and released from the Fort Meade, Md., stockade.

Judge Advocate Criticized

The court said that to try him would violate due process of law. It said that the conduct of Brig. Gen. C. Claude Teagarden, staff judge advocate of the Strategic Air Command, "clearly was not in accordance with accepted standards of performance of the prosecutorial function."

Witnesses at a pretrial hearing last September said that General Teagarden offered the lieutenant immunity if would he disclosed his involvement with Soviet officials and then took, and passed, a polygraph examination.

The decision cannot be appealed by the Government. The court has been considering the case since last Dec. 10.

John K. Russell, a spokesman for the Justice Department, said that no decision is expected "for some time" on whether to proceed in Federal District Court, Baltimore, in a separate legal action. The Department of Defense said charges of "passing vital national security information to the Soviet Union" were under consideration.

When Lieutenant Cooke was arrested last May 21, he was charged with visiting the Soviet Embassy to deliver information or to attempt to deliver information. The immunity offer was prompted by the service's desire to learn the nature of the information purportedly passed to the Soviet Union.

In a statement to the Air Force, Lieutenant Cooke acknowledged visiting the embassy and outlined the information he had provided. Later, for security's sake, the Air Force changed the codes and targets of the missiles.

The Air Force, citing its immunity offer, said that the lieutenant had not passed the polygraph examination. It said that a second round of disclosures by him was not covered by the offer of immunity, and prosecution went forward. That decision led to the appeal by Lieutenant Cooke and his lawyers, who included F. Lee Bailey of Boston.

The majority decision, by Judge Albert B. Fletcher, said General Teagarden had "created a reasonable expectation" that, if Lieutenant Cooke "satisfactorily cooperated with the command

in the matters concerning national security, there would be no court-martial prosecution by military authorities."

The ruling overturned last September's decision by Lieut. Col. David Orser, a military judge, that the Lieutenant should stand trial.

Three Opinions Handed Down

Judge Fletcher said that, by virtue of the immunity offer, the Air Force had obtained the information it needed. He said that, in light of the service's violations of the due-process principle, "the appropriate remedy" was a denial of the right to prosecute under the code of military justice.

The concurring opinion was by Chief Judge Robinson O. Everett, who said that suspects in cases where, as he put it, "the stakes are high," must be able to rely on promises of immunity. "Otherwise," he added, "lips will remain sealed when it is vital to national security that they be unlocked."

In a dissent, Judge William H. Cook said that only Gen. Richard H. Ellis, the former head of the Strategic Air Command, had the power to grant immunity in the case and that it could not have been delegated to General Teagarden.

The decision was praised by Capt. Laurens Tullock, one of the defense attorneys. "This was a courageous decision," he said in a telephone interview. "It reaffirmed the integrity of the military justice system."